SUPREME COURT OF THE UNITED STATES.

No. 128.

JOHN A. BARRY, PLAINTIFF IN ERROR,

vs.

MARY MERCEIN AND ELIZA ANN BARRY.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error - - - - - - - - -	1	2
Citation and service - - - - - - - - -	3	3
Clerk's certificate - - - - - - - - -	4	3
Petition of John A. Barry - - - - - - - - -	5	3
Schedule A, referred to in petition - - - - - - - - -	14	7
B, " " - - - - - - - - -	16	8
C, " " - - - - - - - - -	19	9
D, " " - - - - - - - - -	22	10
E, " " - - - - - - - - -	26	12
F, " " - - - - - - - - -	27	13
G, " " - - - - - - - - -	28	13
Prayer of petitioner denied - - - - - - - - -	32	14

J. & G. S. GIDEON, printers.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States, for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, on the petition of John A. Barry, an alien, and subject of the Queen of the United Kingdom of Great Britain and Ireland, for a writ of habeas corpus ad subjiciendum, to be directed to Mary Mercein, widow of Thomas R. Mercein, and to Eliza Ann Barry, the wife of the petitioner, to have the body of Mary Mercein Barry, the daughter of the petitioner, with the cause of her detention, before the circuit judge of the United States, for the southern district of New York, a manifest error hath happened, to the great damage of the said John A. Barry, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, in the District of Columbia, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the supreme court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fifth day of July, in the year [SEAL.] of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-ninth.

J. W. METCALF,
Clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit.

The answer of the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, to the within writ, containing the citation, petition, and final decision, in the within mentioned matter, as appears by the schedules hereunto annexed.

Attest, J. W. METCALF, *Clerk*,
Circuit court U. S. southern dist. N. Y. 2d circuit.

By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit.

To Mary Mercein, widow of Thomas R. Mercein, and to Eliza Anna Barry, wife of John A. Barry, an alien, and subject of the Queen of the United Kingdom of Great Britain and Ireland.

Whereas, the aforesaid John A. Barry has lately issued out of the Supreme Court of the United States, in the District of Columbia, at the Capitol, in the city of Washington, a writ of error, directed to the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, stating, that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, on the petition of the said John A. Barry, for a writ of habeas corpus ad subjiciendum, to be directed to the said Mary Mercein, and Eliza Anna Barry, a manifest error hath happened, to the great damage of the said John A. Barry. And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, in the District of Columbia, at the capitol, in the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the fifth day of July, in the year of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-ninth.

SAMI. R. BETTS

Southern district of New York, ss:

Hamilton R. Boone, being duly sworn, deposes and says: That on the 9th day of July instant, he served the within citation on Mary Merceni and Eliza Anna Barry, within named, by handing duplicate copies of the same to Mary Merceni, and requesting her to hand one to the said Eliza Anna Barry, she representing her to be unwell at the time.

HAMILTON R. BOONE.

Sworn to this 9th day of July, 1844, before me,

GEO. W. MORTON,
U. S. Com'r.

To their honors the justices of the circuit court of the United States, for the southern district of New York. The petition of John A. Barry, of Liverpool, Nova Scotia, most respectfully sheweth:

That your petitioner is a subject of her most gracious majesty, Victoria, Queen of Green Britain.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States, for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, on the petition of John A. Barry, an alien, and subject of the Queen of the United Kingdom of Great Britain and Ireland, for a writ of habeas corpus ad subjiciendum, to be directed to Mary Mercein, widow of Thomas R. Mercein, and to Eliza Ann Barry, the wife of the petitioner, to have the body of Mary Mercein Barry, the daughter of the petitioner, with the cause of her detention, before the circuit judge of the United States, for the southern district of New York, a manifest error hath happened, to the great damage of the said John A. Barry, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, in the District of Columbia, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the supreme court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fifth day of July, in the year [SEAL.] of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-ninth.

J. W. METCALF,
Clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit.

The answer of the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, to the within writ, containing the citation, petition, and final decision, in the within mentioned matter, as appears by the schedules hereunto annexed.

Attest, J. W. METCALF, *Clerk,*
Circuit court U. S. southern dist. N. Y. 2d circuit.

Southern district of New York, ss:

Hamilton R. Boone, being duly sworn, deposes and says: That on the 9th day of July instant, he served the within citation on Mary Merceni and Eliza Anna Barry, within named, by handing duplicate copies of the same to Mary Merceni, and requesting her to hand one to the said Eliza Anna Barry, she representing her to be unwell at the time.

HAMILTON R. BOONE.

Sworn to this 9th day of July, 1844, before me,

GEO. W. MORTON,
U. S. Com'r.

By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit.

To Mary Mercein, widow of Thomas R. Mercein, and to Eliza Anna Barry, wife of John A. Barry, an alien, and subject of the Queen of the United Kingdom of Great Britain and Ireland.

Whereas, the aforesaid John A. Barry has lately issued out of the Supreme Court of the United States, in the District of Columbia, at the Capitol, in the city of Washington, a writ of error, directed to the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, stating, that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, on the petition of the said John A. Barry, for a writ of habeas corpus ad subjiciendum, to be directed to the said Mary Mercein, and Eliza Anna Barry, a manifest error hath happened, to the great damage of the said John A. Barry. And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, in the District of Columbia, at the capitol, in the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the fifth day of July, in the year of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-ninth.

SAML. R. BETTS.

UNITED STATES OF AMERICA, *southern district of New York, ss:*

I, James W. Metcalf, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals, on file, and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, second circuit, this fifth day of July, in the [SEAL.] year of our Lord one thousand eight hundred and forty-four, and of the independence of the said United States the sixty-ninth.

J. W. METCALF, *Clerk.*

To their honors the justices of the circuit court of the United States, for the southern district of New York. The petition of John A. Barry, of Liverpool, Nova Scotia, most respectfully sheweth:

That your petitioner is a subject of her most gracious majesty, Victoria, Queen of Green Britain.

That on the 30th day of April, 1835, your petitioner, in the city of New York, intermarried with Eliza Anna, eldest daughter of the late Thos. R. Mercein, a citizen of said city.

That in the month of May, immediately subsequent on such marriage, your petitioner, accompanied by his wife, returned to Liverpool, N. S., and there resided until the latter part of May, 1836, when he removed his family to the city of New York.

That on the 29th day of October following, there was born to your petitioner of the said Eliza Anna, a *son*, afterwards baptized by the name of *Mercein;* and on the 12th day of November, in the following year, 1837, a daughter, afterwards baptized by the name of Mary Mercein.

That the said Eliza Anna, by her intermarriage with your petitioner, became a denizen of the British empire, and entitled to inherit, within the said realm, as though she were a British born subject; all the privileges, advantages, and immunities of such denizenship being supervenient upon those of her "*domicilium originis*," as an American citizen.

That the aforesaid children of your petitioner are both subjects of, and allegiant to her most gracious majesty, *Victoria*, Queen of Great Britain, in virtue and by reason of such being the actual condition of your petitioner, their *father*, who is not, and has no intention of becoming, a naturalized citizen of these United States.

That on the 20th day of April, 1838, your petitioner, accompanied by a portion of his family, left the city of New York, and returned to Nova Scotia, where he then made, and still continues to make, the town of Liverpool his *domicil.*

That in consequence of the very early season of the year, at which he found it necessary to embark for Liverpool, and for other reasons bearing on the comfort and convenience of his said wife, and his two children aforesaid, your petitioner deemed it proper then to leave them behind him, for a time, he having given his consent that she and they should remove from the habitation of your petitioner, (after his departure for Liverpool,) to the house of the late Thomas R. Mercein, the father of your petitioner's wife, in the said city of New York, to remain there *temporarily*, until your petitioner should return, and at a proper and more eligible time, in his own judgment, remove them to his own domicil in Nova Scotia, or elsewhere.

That your petitioner returned from Liverpool to New York on the 11th day of May, 1838, having been absent only three weeks, and went directly on his arrival to the house of his late farther-in-law, the said Thomas R. Mercein, where he occupied the same apartment with his wife and children, until the afternoon of the next day.

That your petitioner then believing he had reason to suspect a conspiracy to exist on the part of his wife, and the said Thos. R. Mercein and his family, to render *permanent* in New York that residence which your petitioner had intended *to be only temporary*, and until such time as he should be prepared to remove them to his *domicil*, and *their own* consequent proper home, required to know of his said wife, "whether such were her intention?" And being told by her, that "rather than

think of going to Liverpool," the domicil of your petitioner, "she would part from him at once," your petitioner, with deeply wounded feelings, retired from the said house of his late father-in-law, and took up other lodgings.

That very serious difficulties, consequent on this rupture, occurred between his said wife and your petitioner, which were very greatly augmented by the improper interference, and undue influence, of the said late Thos. R. Mercein and his family. But petitioner, and his said wife, eventually desiring that these differences should be all amicably arranged and reconciled, your petitioner finally agreed to allow his said wife to continue in New York, at her said father's house, until the 1st day of May, 1839, and to retain in her care, during that period, your petitioner's said daughter, Mary Mercein, and his son, the aforesaid Mercein, also, until such time as your petitioner might think proper to require him. Your petitioner then left New York, on the 28th June, 1838, and returned to his home in Liverpool, Nova Scotia.

That your petitioner having made every necessary arrangement for the comfortable establishment of his family in Liverpool, and having engaged, advantageously, in mercantile business, returned to New York in the month of September following, and while there, made every possible effort to conciliate his said wife, to induce her to forego her determination to remain, *permanently*, in New York, and to consent *to go, at some future time*, to her own proper home at Liverpool; but his said wife utterly refusing, and declaring that "*she had no expectation of so doing*," your petitioner, himself, returned to Liverpool, taking his son along with him.

That reiterated and frequent attempts were subsequently made by your petitioner to conciliate his said wife, and to induce her to return to the proper performance of her conjugal, maternal, and domestic duties; but all proving fruitless, your petitioner awaited the expiration of the time he had agreed to allow her to remain in New York, viz: the 1st day of May, 1839; and on the following day, to wit, the second day of the said month of May, 1839, the said Thomas R. Mercein, having previously informed your petitioner's legal adviser, that the paternal claims of your petitioner would be resisted, (a copy of which communication is hereunto annexed, marked A,) your petitioner demanded of his said father-in-law, the late Thomas R. Mercein, in writing, the surrender to him, your petitioner, of both his wife, the aforesaid Eliza Anna, and his female child, the aforesaid Mary Mercein, which demand was not complied with.—A copy of said demand is hereunto annexed, marked B.

That the said wife of your petitioner has, from that time until the present period, resisted all his overtures, and refused to return to his home and domicil, and has absented herself therefrom, and from the discharge of her proper duties to your petitioner and his family, contrary to his desire, and against his will and consent, and has also detained, and does still keep from him, unlawfully, his daughter, the aforesaid Mary Mercein, whom your petitioner is desirous to place in the bosom of his own family, in his own proper habitation at Liverpool, in Nova Scotia.

That your petitioner has ever been willing and desirous, that his said wife should return to her own proper home and duties; that he has always been ready and anxious to employ all his energies, and laboriously to exert his best talents, for her comfortable support and maintenance, *at his own fireside;* but your petitioner disclaims all intention of using any compulsory measures whatever, to occasion her return, other than his legitimate efforts to obtain the custody of his said female child, Mary Mercein, to which he is lawfully entitled, and placing both his children, the said sister and brother together, thereby to afford opportunity for the exercise of the maternal feeling of his said wife, to incite and draw her towards them, and to reclaim her from the impropriety of her present immoral and unauthorized condition.

That your petitioner's said wife, in thus keeping herself separate and apart from him, in violation of her matrimonial vow and engagements, is living in a vicious condition—a condition not even tolerated, much less sanctioned, by the laws of God or man, and is deemed by your petitioner, while so situated, to be an improper person to be entrusted with the care, custody, and education of his said daughter, now in the seventh year of her age, and whose education and studies your petitioner is desirous of himself directing and superintending, *pari passu*, with those of her brother, the aforesaid Mercein, in the house and family of your petitioner, where the said female child will derive from the protection, care, and attention of him and his four daughters, of mature age, and from other means of your petitioner, advantages fully proportioned to her every physical and mental requirement.

That by the recent decease of the aforesaid Thomas R. Mercein, the said wife of your petitioner has been left without any present property, and little or no prospect of any in reversion at a future day, as will be seen by reference to a copy of the last will and testament of the said late Thos. R. Mercein, which is hereunto annexed, marked C.

That the said wife of your petitioner possesses no property whatever, of any kind, in her own right, and has no means, known to your petitioner, for either the present or future support and maintenance of herself or the said female child of your petitioner, both of whom are at present residing with, and the said wife of your petitioner is harbored, countenanced, and encouraged in her present vicious and illegal condition by, her mother Mary, relict of the late Thos. R. Mercein, in the aforesaid city of New York.

That having arrived in New York on the very day of the decease of his father-in-law, the said Thos. R. Mercein, your petitioner deemed it but proper to attend his funeral; and considering it to be his *duty* to avail himself of such a peculiar time for again attempting a reconciliation with his said wife, he immediately, after his arrival, penned a communication for this purpose, which was transmitted by your petitioner's counsel to a brother-in-law of your petitioner's wife, and by him placed in her hands; that the said wife of your petitioner replied to the same, in the most unbecoming and violent manner, misstating and perverting facts, and asserting the deepest falsehoods in relation to your petitioner,

and otherwise exhibiting incontrovertible and satisfactory evidence of her total unfitness to have the custody and bringing up of your petitioner's said daughter, upon whom, and in whose heart, it is impossible, that by her teachings, any feeling of love or deference can be inculcated, or affection cultured towards her father, your petitioner, while her instructress is herself thus deeply imbued with such feelings and spirit, and entertains sentiments such as she has indulged, and unrestrainedly therein expressed.—Copies of said correspondence are hereunto annexed, marked D, E, F, G.

That your petitioner has been subjected, by the unjustifiable behaviour of his said wife, to very heavy and most ruinous expenses—to many and repeated voyages across the ocean, from his proper domicil to this country, at all times at the hazard, and in one or two instances, at the imminent danger of, and very narrow escape with, his life; notwithstanding all which, the said wife of your petitioner *the said wife of your petitioner* still continues to oppose him in all attempted exercise of his marital and paternal rights.

That for such, her conduct, the said Eliza Anna, wife of your petitioner, has no legal, moral, nor other reasonable excuse whatever; and your petitioner claims to be legally entitled to the custody of his said child, in the absence of all unfitness, incompetency, or disqualification on his part, from the mere fact of being its father. And your petitioner further and especially claims the said child to be a British subject, allegiant to the crown of Great Britain, at least during her minority—her infancy incapacitating her from making any choice, and the election of your petitioner being binding upon her until the same shall be avoided by her own disaffirmance of such election, on arrival at her majority.

Your petitioner therefore respectfully prays, that the people's writ of habeas corpus ad subjiciendum, may issue, directed to the said Mary Mercein, relict of the late Thos. R. Mercein, of the city of New York, and to Eliza Anna Barry, the wife of your petitioner, commanding them, forthwith, immediately on the receipt of said writ, to have the body of the said Mary Mercein Barry, the daughter of your petitioner, by them imprisoned or detained, with the time and cause of such imprisonment or detention, before your honors, in this honorable court, to do and receive what shall then and there be considered of the said Mary Mercein Barry.

And your petitioner, as in duty bound, will ever pray, &c. &c. &c.

(Signed) JOHN A. BARRY.

Sworn before me, at New York, this first day of April, 1844.

CHAS. D. BETTS, *U. S. Com.*

Schedule A.

Monday, 8 *o'clock.*

MR. ANTHON.

Sir: I called to state that your note addressed to me, although dated on Friday last, was not received at my house until Saturday evening last, between 9 and 10 o'clock. Allow me to tender this apology for my apparent neglect in delaying an answer.

The requirement of Mr. B. is that a mother, a tender and affectionate mother, should yield up her only infant, and peculiarly delicate child. The proposition is too monstrous to be one moment entertained—it is impossible. How painful and distressing a legal controversy may be, (and no one can more fully appreciate that than all my family,) and however harsh and severe the measures indicated in your note may prove, the babe cannot be surrendered. If ulterior measures result in a decision to that effect, the afflicted must bear the grievous dispensation of providence with such humility and resignation and such grace as the Great Author of All may graciously impart.

The case was on Saturday night, after the receipt of your letter, submitted to Mr. George Griffin, who, after an interview, more than two hours, with Mrs. Barry, was retained as counsel.

I am, very respectfully,
Your obt. servt.
(Signed) THOS. R MERCEIN.

Letter from Thos. R. Mercein, to John Anthon, esq., New York, Monday, 29th April, 1839.

(Copy.)—*Schedule B.*

NEW YORK, 2*d May*, 1839.

Mr. THOS. R. MERCEIN.

Sir: Before me is your answer to Mr. Anthony's note, charging me with what you knew to be unfounded in fact, when you penned it; a proposition too "MONSTROUS" for me even to repeat.

You well know, sir, that no such unholy conception as that of tearing apart the ties of maternity was ever permitted to insinuate its unhallowed entrance into MY breast. No, sir, it is *you* and *yours* alone, who have unrighteously aimed at—who have been long laboring cruelly to cut asunder—to rend, without one feeling of mercy, one solitary emotion of pity, ties implanted so deeply, so rootedly, by the God of Nature in the human soul, that by their severance, not only has reason herself often reeled and forsaken her throne and empire, but even that mysterious bond, uniting the spirit with its mortal tenement, has sometimes been dissolved.

I want from you, sir, nothing more; I will have, sir, nothing *less*, than BOTH *my wife and child.* Our boy, our darling boy, though now in a distant land, and as well taken care of and provided for, as though he were under your roof, presents HIS claims also to "that tenderness and affection of his mother," of which you would seem to speak so very feelingly; which I have labored so anxiously and indefatigably to induce her practically to exhibit towards him, but which you and yours would selfishly have monopolized by the infant with her.

My simple, my reasonable, my only and oft repeated proposition, sir, is, and my unchangeable and unflinching determination too, if I can effect it, by any means effect it, is to unite mother and children and father in one common and cemented bond of love and affection; while *yours*, *yes*, *sir*, YOURS, is to scatter to the four winds of Heaven,

all the indefinable, and perhaps interminable, interests, claims, and obligations involved in these solemn and most sacred relationships.

YOUR responsibility, sir, will be awful; while I, however, have the satisfaction of knowing, that I can appeal to the Searcher of Hearts for the truth of the fact, that in the exercise of every Christian temper and feeling, and kindly aided by His servants, those ministers of peace, I have toiled, I have labored, I have left nothing undone for the restoration of quietude and harmony between us, while the slightest ray of hope, whilst the least prospect of success appeared; and if I be driven to ulterior measures, it is with no less anguish of soul I deplore, than firmness of purpose I shall meet, the emergency. In this case, it will be for that tribunal and the world, before which you are so relentlessly forcing me, to decide which of the two propositions submitted, best deserves the epithet of "MONSTROUS."

Meantime, sir, I have only to say, that in April of last year, I left my wife and two children occupying a temporary abode at your house. In June, I assented to a continuance of Mrs. Barry and child's residence with you until a definite period, which has now elapsed.

I am, sir, prepared to prove, if it be needful, that I have had a comfortable home, with every necessary, and such of the comforts and conveniences of life, as my circumstances and means would afford, prepared for and awaiting her for the past six months. All the varied interests of my family, particularly of her youthful son, equally delicate, and presenting equal claims to maternal attention and solicitude with our babe, demand and require her presence with me to aid and assist me by her talents and services, as well in obtaining and carefully preserving, as in prudently and economically expending, such means as untiring industry and an undistracted attention to business may, with the blessing of Providence, enable me to realize.

I, therefore, now demand from you, sir, not what is embraced in the horrid—the "MONSTROUS" proposition which you have attempted to father on me, viz: "the separation of a peculiarly delicate child from a tender and affectionate mother," but the SURRENDER—the *immediate* SURRENDER to me of both my CHILD AND ITS MOTHER, that I may place them in their proper sphere, viz: in the bosom of MY family, instead of their remaining in the midst of YOURS.

Your immediate answer, sir, is desired, addressed at your pleasure to either Mr. Anthon, or

(Signed) JOHN A. BARRY,
15, *John street.*

(Copy.)—*Schedule C.*

In the name of God, Amen!

Know all men by these presents, that I, Thomas R. Mercein, of the city of New York, being of sound mind, do hereby declare this to be my last will and testament, and my wish and desire is, that the same may be carried into effect by those to whom its execution is entrusted.

I give and bequeath to my wife, Mary Mercein, all the furniture, pro-

perty, and every other article now owned by me, in the house which is now occupied by me, and she hereby has my sanction to sell any part thereof which her situation in life, or other circumstances may require, of which she is to be the sole judge, and she may give or bequeath it according to her own judgment.

I hereby direct that the residue of my property, both real and personal, be vested and remain in my wife, Mary Mercein, for herself, during her life. After her decease, I will and direct that the whole of such estate or property shall be sold by my executors, and the avails be divided equally between my children Imogen, Rosalie, Isabella, and J. Fitz Randolph, and my grand daughter Mary Araminta Swaine, with the proviso hereafter made, viz: if (however improbable as it may at present appear) it should happen that the avails of my estate should be more than $1,500 for each of my children above mentioned, then I direct that Eliza Anna Barry (or her children in case of her death) should have an equal share with my children mentioned above, in the overplus, if any there be, to be vested in herself for her sole and separate use as a feme sole.

And I also state that my beloved children, not included in the above division of my property, have an equal share of my love and affection, and that they are omitted only because justice requires that the little property now remaining be given to those who have had no part heretofore.

And for the purpose of carrying into effect this my last will and testament, I do hereby appoint my wife, Mary Mercein, executrix, and Daniel Ebbets, cashier of the Union Bank, executor.

And I do hereby authorize my said executors to sell any part of my estate for the payment of my debts, being governed by the selection of my said wife in relation to the property to be sold; and I also authorise and empower them to compromise and compound debts due me in their discretion.

In witness whereof, I have hereunto set my hand and seal, this fourteenth day of December, in the year one thousand eight hundred and forty-two.

(Signed) THOS. R. MERCEIN. [L. S.]

Signed, sealed, published, and declared by the said Thos. R. Mercein, the testator, as and for his last will and testament, in our presence, who, at the request of the testator, and in his presence, and in the presence of each other, have subscribed our names as witnesses hereunto, the day and year above written.

(Signed) DAN'L STANBURY,
93, *Amos street*, *New York*.
JOHN R. MUMFORD,
763, *Greenwich street*, *New York*.

Schedule D.

John A. Barry to John Anthon, esq.

NEW YORK, *25th Oct.*, 1843.

DEAR SIR: The kindness which you manifested in the early stage of

my domestic difficulties, by endeavoring, through a private and friendly communication with my late father-in-law, to induce him to yield to their peaceful settlement, emboldens me again to solicit your friendly aid, if not inconvenient to you, in a somewhat similar way, under our altered and peculiar circumstances, at the present moment.

I arrived in this city late last evening, and it was not until within the last hour or two that I was made acquainted, accidentally, with the decease of Mr. Thomas A. Mercein, which took place yesterday. I have likewise but just now been informed of the sudden death, a very short time since, of Mr. Daniel Stanbury, the brother of *Mrs.* Mercein. These solemn and unanticipated occurrences have, of course, involved the surviving families in very deep affliction, to which I have no inclination to add; but, on the contrary, every disposition, as far as it can be in my power, to mitigate, consistently with the proper maintenance of my own personal rights. I, too, sir, since my return to Nova Scotia, in August last, have followed to the grave a much beloved and venerable father. Chastened feeling usually results from events of this melancholy and mournful character; and if, in the present instance, this has been realized, and is inclined to be cherished by those opposed to me in the vindication of my paternal rights, it has suggested itself to my mind that a favorable opportunity is hereby afforded me of making another renewed offer of peaceful reconcilement. I am perfectly satisfied that my domestic troubles have been much longer perpetuated than they would otherwise have been, from the undue influence and iniquitous conduct of *counsel*, through whose advice Mrs. Barry has sworn that she hitherto refrained from answering my letters addressed to her, though couched in the kindest language, dictated by purest motives, and transmitted to her with the deepest sincerity. Though my heart now dictates the measure, yet my judgment leads me to apprehend that it were, in all probability, under such circumstances, utterly useless for me again to *address myself directly to Mrs. Barry;* or at least more time would possibly be required by this mode than I can at present spare. I have therefore concluded it to be much more proper, and far more likely to be availing, to communicate with you, sir, (who can, with much more propriety, and doubtless much more command of attention, than myself, hold an intercourse with that *counsel,)* and avow the continuance of my long-cherished wishes and fervent hopes of a peaceful reconciliation and re-union with my wife. I am fully prepared, on my part, to forgive and forget—to bury in entire oblivion the remembrance of every difficulty and unhappy transaction which has taken place between Mrs. Barry, her friends, and myself, since the 20th day of April, 1838, the day on which, with the deepest feelings of affection, I took leave of her at my own habitation in this city, in order to return temporarily to Nova Scotia. I am, sir, still deeply solicitous that she should return to the faithful performance of those duties which she owes to herself, to her offspring, and to society; in the due discharge of which she can alone expect any peace or serenity of mind. I am most willing to meet, and fully prepared to receive, her kindly, and to accord to her all her proper claims on me, most

conscientiously. I, therefore, sir, authorize you to tender, most frankly, the above proposition, but with the *clear understanding*, that I am not incited to it by any, the smallest, apprehension whatever, of defeat, in a further prosecution of the legal contest in which I have been, and am now, involved by the other side, should it so happen that it be *their* pleasure it should be continued.

The same sincere disposition which I have ever cherished to quench the spirit of animosity on their part, so ruinous to our own mutual interests and those of our innocent children; the same anxious wish for the promotion of peace and the welfare of all parties—consistently with the proper regard for my own rights—which I have ever indulged, together with the now additionally ardent desire, that the character and actions of the dead, in relation to past occurrences, should remain henceforth undisturbed, are the sole reasons which impel me thus to trouble you on this occasion.

I view it as a solemn duty which I owe to our offspring, to my wife, and to myself, to avail myself of the serious, peculiar, and interesting circumstances of all parties at the present moment, in order to endeavor to bind up the wounds which have unhappily been so long unhealed; and that, in whatever course I may hereafter be compelled to move—should I unhappily fail in this renewed peaceful overture, I may be able to look back upon my own conduct in the matter with no consciousness of self-reproach.

You will, sir, of course, perceive the absolute necessity of your receiving an *immediate* and *categorical* answer to this proposal, as the interests of my family, and my business concerns, on this my *fourteenth* voyage to this country, on this same errand, render my time exceedingly precious at this advanced period of the year.

I am, very dear sir, with great respect, your obedient and obliged servant,

(Signed,) JOHN A. BARRY.

To JOHN ANTHON, esq., &c., &c.

Schedule E.

John Anthon, esq., to Henry A. Heiser, brother-in-law to Mrs. Barry.

Thursday, 26th October, 1843.

DEAR SIR: I have just received the enclosed communication from Mr. Barry.

It has been my wish, as you well know, from the beginning, to adjust the unfortunate dispute between the parties in an amicable manner. I think, notwithstanding all that has passed, that they may yet live happily together.

I therefore avail myself of the present opportunity to effect, if I can, so desirable an object. You will see, by the terms of the letter, that Mr. B. contemplates a treaty to be opened between the *counsel*. I think it more prudent to take the present movement *out of the law*, and to refer its consideration to the "*fireside*."

I have taken the liberty to enclose the communication, as I have received it, to you, having great confidence in your judgment and forbearance. Make what use of it you may deem most prudent, and let me hear from you at an early day,

Yours, &c.,

(Signed) JOHN ANTHON.

Mr. HENRY HEISER, &c., &c., New York.

Schedule F.

Henry A. Heiser to John Anthon, esq.—Copy.

NEW YORK, *Oct.* 30, 1843.

DEAR SIR: Yours of the 26th ult., with enclosure, was received, and at once enclosed to Mrs. Barry.

The within is her answer. I had intended to have sent it to you before, but circumstances prevented.

Yours, truly,

(Signed) H. A. HEISER.

JOHN ANTHON, esq., New York.

Mrs. Barry to her brother-in-law, Henry A. Heiser, and enclosed by him to John Anthon—copy:

Schedule G.

"Friday evening. I have read the letters, Henry—from Mr. Barry nothing, (save generous feeling,) could surprise me. But I confess that I was not prepared for that, which last evening appeared to me to be, on the part of Mr. Anthon, a gratuitous insult to my father's memory, and my father's family. Had the letter been merely a *legal one*, written from *counsel*, it would have caused slight feeling; but Mr. Anthon writes as Mr. Barry's friend, and I considered him as endorsing all the latter said, even to the reflection on the sainted dead. I know Mr. Anthon only from the world's report, which gives him credit for intellect and learning, and my crushed feelings murmured, "surely, God must have created him without a heart." But twenty-four hours have passed since this first outbreak of feeling, and I have endeavored to place myself in Mr. Anthon's position. He thinks the original causes of difference *slight*—he has listened to Mr. Barry's sophistries—has read his smoothly varnished letters—perhaps believes in his pretended reformation. I have been restrained, constrained, governed, persuaded, my family and my counsel have done the wrong. I, of course, have a peculiar feeling towards the father of my children, &c. Thus Mr. Anthon may have reasoned, for thus may he have been deceived; and oh! should I not remember, that in former years, I also listened, I also read, I also yielded, and was destroyed. Do not feel, Henry, as I have felt; Mr. Anthon could not have intended to wound as deeply as he has. He knew my father, and to know him was to respect him; even his destroyer feels that in his heart. But oh! it is hard to bear—to feel, that ere our tears had even momentarily ceased to flow—that ere the new made widow, and the fatherless,

had had time to call to mind the many precious promises, now all their own, that the luxury of our grief must be invaded, the sanctity of our privacy destroyed, and the tears of sorrow dried upon our cheeks, by the flush of righteous indignation.

"I think, notwithstanding all that has passed, they may yet live happily together." So writes Mr. Anthon. I ask not if he remembers my first-born, torn from his mother's arms and carried to a distant land; her very existence concealed from him; and her knowledge of his welfare, derived only from sympathising strangers. I ask not if he remembers, that ere a beloved sister's form was cold within her grave, our home was entered, my infant torn from me, my person injured, and consigned to the grasp of a base confederate, and we, in that hour of nature's anguish, dragged before a public court. I ask not what value we are to place upon Mr. Barry's *oaths*, when all this was done in violation of a solemn and legal covenant. I ask not if he knows, that for weeks, and months, during his late visit to New York, my boy was exhibited to strangers, and almost within my grasp, was yet withheld from an imploring mother's eye. But I would ask, can Mr. Anthon forget the scorn and contumely heaped upon him who put forth his hand to shield a daughter from what a three years' experience had proved a living death? Can he forget that Mr. Barry swore that my father was "bankrupt in character," and that he "feared the morals of his child would suffer contamination from a residence beneath his roof"? Does not Mr. Anthon know that my father died the victim of Mr. Barry's persecutions, and that when assembled friends had met, to pay the last respect to his hallowed remains, he, the destroyer, came to revel in the ruin he had wrought? Does Mr. Anthon know that the letter he enclosed, was written ere yet the damp was dried from off the shoes with which he followed my dead father's body? Oh! Mr. Anthon could not have known—memory must have proved treacherous, ere he could have thought it possible, that my hand could ever rest within Mr. Barry's clasp, or even his prayed-for repentance, call forth any warmer feeling than that of deepest pity, for one so almost irrecoverably lost, one who, but for God's abounding mercy, were irretrievably condemned. I thought at first I would write to Mr. Anthon, appeal to his filial and paternal feelings, bid him remember the parents who cherished him, the daughters who surround him, and implore him, as he valued the future welfare of his children, to do to me as he would have others do to them. 'Tis the countenance of such as he is, that gives Mr. Barry even the slight hold he now sustains in society. But I find that I cannot write as I would. You enter into my feelings; tell Mr. Anthon what you will, and may heaven forgive him, as I do, his perhaps unguarded expression.

(Signed,) ELIZA."

Prayer of petitioner denied.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the

city hall, in the city of New York, on Saturday, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and forty-four.

Present, the honorable Samuel R. Betts, judge.

In the matter of the application of John A. Barry for a writ of habeas corpus.

A motion having been heretofore made, upon the petition filed, that a writ of habeas corpus issue, as prayed for therein, and the said petition, upon the matters therein set forth, having been brought to hearing before the circuit court of the United States, of the second circuit, for the southern district of New York, and due deliberation being had in the premises, now, at this day, to wit, on the twenty-fifth day of May, one thousand eight hundred and forty-four, in this same term of April, it is considered by the said court, that the writ of habeas corpus ad subjiciendum, prayed for by the said petitioner, ought not to be allowed and granted: Wherefore it is considered, ordered, and adjudged, by the said court, that the prayer of the said petition, upon the matters therein set forth, for the writ aforesaid, be disallowed and denied; and judgment is accordingly rendered denying the same.

Filed, 17 July, 1844.